No. 80-802

IN THE

Supreme Court of the United States

OCTOBER TERM, 1980

NATIONAL GERIMEDICAL HOSPITAL AND GERONTOLOGY CENTER,
Petitioner,

v.

BLUE CROSS OF KANSAS CITY AND BLUE CROSS ASSOCIATION,
Respondents.

On Writ of Certiorari to the United States Court of Appeals for the Eighth Circuit

BRIEF FOR PETITIONER

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QUESTION PRESENTED

The National Health Planning and Resources Development Act of 1974, as amended, directs a Health Systems Agency (in this case a private Missouri corporation engaged in health planning activities) to "seek, to the extent practicable, to implement its HSP [Health Systems Plan] and AIP [Annual Implementation Plan] with the assistance of individuals and public and private entities in its health service area."

The question presented is whether this general statutory language is so inconsistent with the antitrust laws that it should be construed to grant an exemption from those laws for a concerted refusal to deal by Blue Cross of Kansas City, Blue Cross Association, and other persons, where there was no involvement by a state or federal agency, where there was no state or federal mandate or supervision of the parties or conduct involved, and where the federal statute did not expressly immunize the boycott.

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BRIEF FOR PETITIONER

OPINIONS BELOW

The Opinion of the United States Court of Appeals for the Eighth Circuit is reported at 628 F.2d 1050, and is set out in the Joint Appendix at pp. 199a-213a. The Order of the District Court for the Western District of Missouri is reported at 479 F. Supp. 1012, and is set out in the Joint Appendix at pp. 171a-198a.

JURISDICTION

The judgment of the United States Court of Appeals for the Eighth Circuit was entered on July 22, 1980. (J.A. at 215a.) A petition for rehearing and rehearing en banc was denied on August 22, 1980. (J.A. at 217a.) The Petition

for Certiorari was filed on November 18, 1980, and was granted January 26, 1981.

The jurisdiction of this Court rests on 28 U.S.C. § 1254 (1).

STATUTORY PROVISIONS INVOLVED

Section 1 of the Sherman Act, 15 U.S.C. § 1, provides in pertinent part:

> Every contract, combination in the form of trust or otherwise, or conspiracy, in restraint of trade or commerce among the several States, or with foreign nations, is declared to be illegal.

Section 2 of the Sherman Act, 15 U.S.C. § 2, provides in pertinent part:

> Every person who shall monopolize, or attempt to monopolize, or combine or conspire with any other person or persons, to monopolize any part of the trade or commerce among the several States, or with foreign nations, shall be deemed guilty of a felony.

Section 300*l*-2(c)(1) of the National Health Planning and Resources Development Act, as amended, as it appears in 42 U.S.C., provides:

> A health systems agency shall implement its HSP [Health Systems Plan] and AIP [Annual Implementation Plan], and in implementing the plans it shall perform at least the following functions:
>
> > (1) The agency shall seek, to the extent practicable, to implement its HSP and AIP with the assistance of individuals and public and private entities in its health service area.

STATEMENT

This case involves the boycott of a new entrant nonprofit hospital by private health care reimbursement organiza-

tions. The facts before the court below may be summarized as follows:[1]

The petitioner, National Gerimedical, is a fully accredited, general acute care community hospital which opened on October 16, 1978. (J.A. at 6a; D.R. Supp. at 15.) It has been continuously licensed by the Missouri Division of Health since September, 1977, and has been fully certified as a Medicare provider by the Department of Health, Education and Welfare (now Health and Human Services) since its opening. (D.R. Supp. at 14.) One of the respondents, Blue Cross of Kansas City ("Blue Cross"), is a Missouri Health Services Corporation which markets and sells prepaid health reimbursement plans to the public, and contracts with health care providers to administer the plans. (J.A. at 7a; 479 F. Supp. at 1015, J.A. at 174a.) The other respondent, Blue Cross Association ("BCA"), is a national organization to which local Blue Cross plans, including Blue Cross, belong. (J.A. at 7a; D.R. at 198.)

Prior to opening in 1978, petitioner sought to enter into a participating hospital agreement with Blue Cross. This was important to National Gerimedical's economic viability: participating hospitals receive directly one hundred percent reimbursement for covered hospital services rendered to individual Blue Cross subscribers; reimbursement for covered services at nonparticipating hospitals is made, not to the hospital, but directly to the subscriber, and for no more than eighty percent of the cost of the services. (J.A. at 9a; 479 F. Supp. at 1015-16, J.A. at 174a.) It was feared (and rightly so) that lack of participating hospital status would discourage Blue Cross subscribers from seeking services at National Gerimedical, thereby placing it at a substantial competitive disadvantage. (J.A. at 15a-

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[1] Citations to the record below are to the Designated Record on Appeal, cited "D.R."; to the Supplementary Designated Record on Appeal, cited "D.R. Supp."; and to the Joint Appendix, cited "J.A."

16a, 168a; D.R. Supp. at 19.) Blue Cross' individual members account for approximately one-fourth of all area hospital admissions, and all licensed general acute care community hospitals in Blue Cross' service area except National Gerimedical have Blue Cross participating contracts. (J.A. at 8a-9a; D.R. at 261; 479 F. Supp. at 1015, J.A. at 174a.)

On March 21, 1978, Blue Cross refused to enter into a participating hospital contract with National Gerimedical solely because it had not obtained a "finding of need" from the Mid-America Health Systems Agency ("MAHSA"). (J.A. at 10a; 479 F. Supp. at 1016, J.A. at 175a.) MAHSA is a private, not-for-profit Missouri corporation engaged in voluntary health planning activities. It is funded as a health systems agency within the terms of the National Health Planning and Resources Development Act of 1974 ("Planning Act"), 42 U.S.C. §§ 300k *et seq.*[2] (J.A. at 7a; 479 F. Supp. at 1016, J.A. at 175a.) Under the Planning Act, an HSA's sole function with respect to new hospital construction is to advise state health agencies. 42 U.S.C. 300*l*-2(f).

Since no federal or Missouri law required National Gerimedical to seek or secure "need" review,[3] and since MAHSA

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[2] The Planning Act established three types of health planning agencies. (*See* 42 U.S.C. §§ 300*l*-1, 300m, 300m-3.) The only type directly relevant here, Health Systems Agencies (HSAs), may be nonprofit, private corporations, public regional planning bodies, or single units of local governments. 42 U.S.C. § 300*l*-1(b)(1)(A)-(C). MAHSA, which is a private corporation, was conditionally designated by the Secretary of the Department of Health, Education, and Welfare (now the Department of Health and Human Services ("DHHS")) as one of 205 regional health systems agencies under the Planning Act on April 12, 1976. (D.R. at 18.)

[3] At the time petitioner's complaint was filed and at all pertinent times, Missouri had no compulsory certificate of need program, nor had it designated a State Health Planning and Development Agency in accordance with 42 U.S.C. § 300m. (J.A. at 139a-140a; 628 F.2d at 1054, J.A. at 205a.) Both are prerequisites to any

had publicly declared that it would disapprove the addition of any additional acute care hospital beds (J.A. at 11a; 479 F. Supp. at 1016, J.A. at 175a.), National Gerimedical did not seek review by MAHSA. On that sole basis, Blue Cross denied petitioner's request for participating hospital status. (J.A. at 10a, 169a-170a; 479 F. Supp. at 1016, J.A. at 175a.) The Blue Cross "need" requirement was imposed by Blue Cross pursuant to BCA policy guidelines. (J.A. at 10a-11a, 153a, 164a-165a.)

Proceedings Below

On May 23, 1978, National Gerimedical filed an antitrust complaint in the United States District Court for the Western District of Missouri against Blue Cross and BCA, in

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requirement under the Planning Act to seek "need" review by the relevant HSA. *See* 42 U.S.C. § 300m-2(a)(4)(A). In August, 1979, Missouri enacted a Certificate of Need Law (Mo. Ann. Stat. §§ 197.300 *et seq.* (Vernon Supp. 1980)), which, by its terms, became fully effective in October, 1980. Under the provisions of that law, petitioner was deemed to have received a certificate of need.

In addition, Missouri was not a participant in the health care capital expenditure review program under section 1122 of the Social Security Act (42 U.S.C. § 1320a-1), pursuant to which a state may voluntarily enter into a contract with DHHS by which it designates an agency of the state to review the need for new capital health care expenditures. Under that program, health care facilities may not be reimbursed under the Medicare, Medicaid, or maternal and child health programs for depreciation, interest, or return on equity capital or other expenses relating to capital expenditures determined by the designated state planning agency to be unnecessary. On June 30, 1976, Missouri refused to renew its section 1122 contract. (J.A. at 139a; 628 F.2d at 1053, J.A. at 203a.) Thus, no section 1122 program was in effect in Missouri at any time here pertinent.

Blue Cross' "requirement" of MAHSA approval, therefore, was not mandated by any federal or state legislation, and in fact was flatly inconsistent with the public policies established by the state legislature of Missouri.

which it named MAHSA and others as non-defendant co-conspirators.[4] The complaint alleged that a collective refusal to deal by Blue Cross and BCA, acting in concert with various co-conspirators, constituted a violation of section 1 of the Sherman Act, and that Blue Cross' actions, standing alone, violated section 2 of that Act. (J.A. at 10a-14a; 479 F. Supp. at 1014, J.A. at 171a-172a.)

On July 14, 1978, BCA and Blue Cross moved to dismiss the complaint on a variety of grounds. (J.A. at 19a-23a; 479 F. Supp. 1014, J.A. at 172a.) On November 2, 1979, the district court, treating the motion as one for summary judgment, held that the complaint stated a cause of action under section 1; that the requisite effect on interstate commerce had been properly alleged; and that the conduct involved was not exempt from antitrust scrutiny under section 2 of the McCarran-Ferguson Act (15 U.S.C. § 1012), as that exemption was construed by this Court during the pendency of this action in *Group Life & Health Insurance Co.* v. *Royal Drug Co.*, 440 U.S. 205. (479 F. Supp. at 1016-19, 1024-26; J.A. at 176-181a, 192a-196a.) Nevertheless, the district court granted summary judgment for defendants, finding that the Planning Act [5] created an implied "blanket exemption" from the antitrust laws for any and all voluntary private action "taken pursuant to the Act and clearly within the scope of the Act." (479 F. Supp. at 1021, 1024; J.A. at 186a, 192a.)

The district court relied primarily on section 300*l*-2(c)(1) of the Act, which merely directs HSAs to seek the assistance of individuals and public and private entities in im-

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[4] The other named co-conspirators were all either individuals who served simultaneously as members of the Board of Trustees of Blue Cross and the Board of Directors of MAHSA, employees of Blue Cross serving as members of the MAHSA Board of Directors, or individuals employed by competitors of National Gerimedical who served on the Blue Cross Board of Directors.

[5] 42 U.S.C. §§ 300k *et seq.*

plementing their health service plans,[6] and on the MAHSA plan itself, which states as objectives various cost containment goals. On this tenuous basis, the court concluded that "the certificate of need requirement voluntarily adopted by Blue Cross of Kansas City seems to be authorized by the Act as well as the implementation plan of MAHSA." (479 F. Supp. at 1021, J.A. at 186a.) The court then found an irreconcilable conflict between the antitrust laws and the Planning Act which required a "blanket" exemption from the antitrust laws for any and all private actions ostensibly taken to further the public policy goals of the Act. (479 F. Supp. at 1021, J.A. at 186a.)[7]

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[6] Section 300*l*-2(c)(1) reads as follows:

> A health systems agency shall implement its HSP [Health Systems Plan] and AIP [Annual Implementation Plan], and in implementing the plans it shall perform at least the following functions:
>
> (1) The agency shall seek, to the extent practicable, to implement its HSP and AIP with the assistance of individuals and public and private entities in its health service area.

[7] The court reasoned:

In determining if an exemption to the antitrust laws can be implied, courts have distinguished two types of exemptions—specific and blanket. A specific repeal of the antitrust laws implies an exemption only for particular conduct or activity. An exemption for an entire legislative scheme would be a blanket exemption. Courts that have upheld claims of implied repeal have normally limited this repeal to the specific conduct challenged in that particular case; *however, in the circumstances of this case defendant's claim is that the entire concept of the National Health Planning and Resource Development Act presupposes nonapplication of the antitrust laws so that any activity authorized and within the scope of that Act is free from antitrust challenges.* The proper issue in this case then is whether there is a plain repugnancy between the scope of the National Health Care Planning and Development Act and the antitrust laws. Another formulation of this same test of somewhat easier application is whether an exemption to the anti-

The Court of Appeals, noting that the district court's finding of implied immunity for Blue Cross rested primarily on section 300*l*-2(c)(1) of the Act (628 F.2d at 1052, J.A. at 202a), affirmed the decision in an opinion which closely adhered to the district court's analysis. It concluded that "the Act and regulatory scheme clearly call for the action which has now become the basis of an antitrust claim"; the Court of Appeals thus agreed with the district court that there was a "clear repugnancy between the Act and the antitrust laws." (628 F.2d at 1055, J.A. at 209a.) Finally, it adopted the district court's analysis and conclusion that it was the "intent of Congress to immunize this type of voluntary action from the antitrust laws." (628 F.2d at 1056, J.A. at 209a.)

SUMMARY OF ARGUMENT

The Planning Act was designed to create a "delicate but workable" regulatory process to deal with what Congress believed was a problem of unnecessary hospital construction. The Act was carefully constructed to permit the participation of various elements of the industry, together with consumers, in the planning process, but it reserved regulatory duties to the States. The Act specifically left to the States the basic discretion as to how and when to implement the affirmative regulatory elements of the planning process envisioned by the Act.

Respondents here, under the rubric of "implied repeal," assert the right to engage in voluntary private cartel regulation, with no public agency oversight or judicial review, without regard to the antitrust laws. They argue that this was the intent of Congress, ignoring the facts that Con-

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trust laws is necessary to make this statutory scheme effective. The Court believes the answer is yes. *In the Court's view, voluntary cooperation of the entire health care industry, including third party payors, is essential to the success of the Act.* (479 F. Supp. at 1021, J.A. at 186a.) (Emphasis added.)

gress specifically dealt with the scope of immunity under the Planning Act, not only at the time of initial passage but on at least one occasion since, and that Congress rejected various suggestions—including some made by respondent BCA—either to require the conduct at issue here or to broaden the statutory immunity from collateral attack. In the light of the language of the statute and its legislative history, there is no ascertainable basis for a finding that Congress had a "clear and manifest" intention to grant broad immunity from the antitrust laws to all actions—however motivated and whatever their effect—arguably consistent with the generally stated policy goals of the Planning Act. The record shows that Congress knew what immunity it wanted to give and did so.

Nor is there any irreconcilable conflict between the Planning Act and the antitrust laws. The antitrust laws prohibit, *inter alia*, private collusive conduct with either the purpose or effect of unreasonably restraining trade. In some circumstances, such as the group boycott alleged here, conduct is deemed *per se* illegal, and no showing of any particular effect is necessary. The Planning Act requires no such conduct; indeed, it neither requires nor authorizes any coercive conduct of any kind by private entities. Thus, there is no conflict between the two statutory schemes; certainly, it cannot be argued that *pro tanto* repeal of the antitrust laws is "necessary to make the [regulatory scheme] work," which is the "guiding principle" for a conclusion of implied repeal set forth by this Court in *Silver* v. *New York Stock Exchange*, 373 U.S. 341, 357.

Finally, the Planning Act does not create the sort of "pervasive regulatory scheme" that this Court has identified as an important element in finding implied repeal. Here, no federal agency exercises any regulatory jurisdiction of any kind over respondents. No federal or state agency has (much less has exercised) any power pursuant to the Planning Act to approve the conduct at issue here. MAHSA, the agency on whose planning documents the courts below relied so heavily, is a private corporation whose authority

under the Planning Act is limited to making recommendations—hardly the equivalent of the SEC or CAB. In short, there is no regulatory scheme and no regulatory agency of the sort upon whose existence previous implied repeal decisions have been based.

The decisions below have ignored the principle that is the cornerstone of the Sherman Act—that private collusive conduct unsupervised by an independent public body is dangerous to the public interest and thus must be subject to antitrust enforcement. To replace this standard, a subjective test is advanced—whether the private conduct was arguably consistent with the policy of some federal statute. But this Court has never lightly assumed a Congressional intent to turn the powers of government over to private entities with private motives. Even where there is some involvement by a public body, this Court has searched to see whether its supervision would assure that the public interest would predominate. *See, e.g., California Retail Liquor Dealers Association* v. *Midcal Aluminum, Inc.*, 445 U.S. 97, 106, where this Court said, in language fully applicable here, that "[t]he national policy in favor of competition cannot be thwarted by casting . . . a gauzy cloak of state [or public] involvement over what is essentially a private . . . arrangement."

The "gauzy cloak" of implied repeal should not be allowed to protect the purely private action challenged here, with its inherent conflicts of interest and total absence of due process. Congress did not intend such a result. The decision below to the contrary is erroneous and should be reversed.

ARGUMENT

I.

Introductory Statement

This case involves the application of the antitrust laws to the health care industry—an industry which already

accounts for almost one-tenth of this nation's total GNP [8] and represents the single largest component of the services sector of our economy.[9]

Until very recently, health care providers and insurers were largely insulated from the market forces that regulate, more or less directly, most other sectors of our national economy. *See, e.g.*, C. Havighurst, "Professional Restraints on Innovation in Health Care Financing," 1978 *Duke L.J.* 303, 343 (1978). In recent years, however, more and more commentators and legislators have begun to advocate increased reliance on market forces as a means to encourage more effective and efficient delivery of health care services.[10]

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[8] *See* M. Freeland, G. Calat & C. Schendler, "Projections of National Health Expenditures, 1980, 1985, and 1990," *Health Care Financing Review* 1, 6 (Winter, 1980). Between 1965 and 1978, health care expenditures as a percentage of GNP rose from 6.2% in 1965 to 9.1% in 1978, and are expected to rise to 11.5% in 1990. *Id.* at 6. Growth has been especially great for the services funded by third parties such as respondent Blue Cross. Health Care Financing Administration, *Health Care Financing Trends* 1 (Spring 1980).

[9] *Health Services Policy Session* (briefing book prepared by Federal Trade Commission Staff, 1979), at 1.

[10] *See, e.g.*, Address by A. E. Kahn, "Health Care Economics: Paths to Structural Reform," American Enterprise Institute Conference on Health Care (Sept. 25, 1980); W. McClure, "On Broadening the Definition of and Removing Regulatory Barriers to a Competitive Health Care System," 3 *J. of Health Politics, Policy and Law* 303 (1978); M. Pollard, "Fostering Competition in Health Care," in *Regulating Health Care: The Struggle for Control*, 33 *Proceedings of the Academy of Political Science* 158 (A. Levin ed. 1980); P. Ellwood, "Alternatives to Regulation: Improving the Market," in *Controls on Health Care, Papers of the Conference on Regulation in the Health Industry* (National Academy of Sciences 1975); J. Christianson and W. McClure, "Developing a Regulatory Strategy Consistent with a Competitive Health Care System," in

Simultaneously, recent decisions of this Court have reduced traditional legal barriers to the increased influence of market forces in the health care industry.

In *Goldfarb* v. *Virginia State Bar*, 421 U.S. 773, and *National Society of Professional Engineers* v. *United States*, 435 U.S. 679, for example, this Court rejected the contention that the "learned professions" are exempt from the requirements of the antitrust laws. In *California Retail Liquor Dealers Association* v. *Midcal Aluminum, Inc.*, 445 U.S. 97, and predecessor cases,[11] this Court significantly

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Socioeconomic Issues of Health 1980 103 (American Medical Association 1980); A. Enthoven, "Health Care Costs: Why Regulation Fails, Why Competition Works, How to Get There from Here," 11 *National Journal* 885 (May 26, 1979); R. Posner, "Certificates of Need for Health Care Facilities: A Dissenting View," in *Regulating Health Facilities Construction* 113 (C. Havighurst ed. 1974); R. Helms, "Regulating the Cost of Health Care: Can We Learn from Experience?" (American Enterprise Institute 1978). *See also* S. Allalouf, "Letting Market Forces Help Govern Provision of Health Care," *New York Times*, Feb. 9, 1981, at A19.

In the last Congress alone, three bills were introduced which were intended to promote competition within the health care industry as a means of curbing costs: S. 1590 (The Comprehensive Health Care Reform Act), 96th Cong., 1st Sess. (1979); S. 1968 (The Health Incentives Reform Act), 96th Cong., 1st Sess. (1979); and H.R. 5740 (The Health Cost Restraint Act), 96th Cong., 1st Sess. (1979). At least one bill, H.R. 850 (The National Health Care Reform Act of 1981), 97th Cong., 1st Sess. (1981), has already been introduced in this Congress.

[11] *Goldfarb* v. *Virginia State Bar*, 421 U.S. 773 (rejecting claim by the Fairfax County Bar that the ethical codes and activities of the State Bar "prompted" it to issue fee schedule, thus immunizing it from the antitrust laws); *see City of Lafayette* v. *Louisiana Power & Light Co.*, 435 U.S. 389; *Cantor* v. *Detroit Edison Co.*, 428 U.S. 579. *See also New Motor Vehicle Board of California* v. *Orrin W. Fox Co.*, 439 U.S. 96; *Bates* v. *State Bar of Arizona*, 433 U.S. 350.

narrowed the *Parker* v. *Brown* [12] "state action" exemption, which now provides only a limited shield for anticompetitive private actions voluntarily taken as a response to state law and regulatory regimes. In *Hospital Building Co.* v. *Trustees of Rex Hospital,* 425 U.S. 738, this Court interpreted the Sherman Act to reach local activities of health care providers if they had a significant effect on interstate commerce. In *Group Life and Health Insurance Co.* v. *Royal Drug Co.,* 440 U.S. 205, this Court, specifically noting that "exempting provider agreements from the antitrust laws would be likely in at least some cases to have serious anticompetitive consequences" (440 U.S. at 232, n.40), concluded that pharmacy provider agreements were not within the McCarran-Ferguson Act exemption from the antitrust laws. In sum, in the process of developing the rules of law applicable to health care providers and insurers, the decisions of this Court have increased the opportunity for competition to function with greater effectiveness in the health care industry.

The rationale of the decisions below, if adopted by this Court, would seriously restrict the growing influence of competition policy in the health care sector. It would provide an umbrella of protection for many types of anticompetitive activities, so long as they could be said to be in some way consistent with the goals of the Planning Act. Nothing in either the language or the legislative history of the Planning Act supports the view that Congress intended such a result; in fact, both strongly suggest the contrary. Nor are the Planning Act and the antitrust laws in any way irreconcilable; the Act neither commands nor permits any action prohibited by the antitrust laws and the regulatory process envisioned by the Act does not require the ouster of the antitrust laws. Unless cartel regulation in the health care industry is to be the result, the decision of the Court of Appeals should be reversed.

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[12] 317 U.S. 341.

II.

Under The Guidelines Established By This Court, There Is No Basis Here For Finding An Implied Repeal Of The Sherman Act.

The decision below departs radically from the legal principles governing implied repeal established by this Court in a long line of decisions. "It is . . . a cardinal principle of statutory construction that repeals by implication are not favored." *Radzanower* v. *Touche Ross & Co.*, 426 U.S. 148, 154, *quoting United States* v. *Continental Tuna Corp.*, 425 U.S. 164, 168.[13] This Court has clearly established that, where a fundamental national policy is at issue, a finding of implied repeal is not appropriate unless there exists a "clear and manifest" expression that Congress intended such repeal. *Tennessee Valley Authority* v. *Hill*, 437 U.S. 153, 189-90; *Morton* v. *Mancari*, 417 U.S. 535, 550. *See also Posadas* v. *National City Bank*, 296 U.S. 497, 503. "In practical terms, this . . . means that '[i]n the absence of some affirmative showing of an intention to repeal, the only permissible justification for a repeal by implication is when the

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[13] In his dissenting opinion in *Radzanower*, Justice Stevens explained the reason for this rule as follows:

> The rule that repeals by implication are not favored, like all other canons of statutory construction, is merely one of the guidelines to observe in the search for a construction which will best reflect the real intent of the legislature. When we are dealing with a well-established and clearly defined old rule, it is usually reasonable to suppose that the legislative intent to change such a rule would be unambiguously expressed. Or if we are dealing with an old rule that is an established and important part of our national policy, we must be sure that it is not changed simply by inadvertent use of broad statutory language. *Thus, if Congress intended* to modify the long-settled practice of preferential hiring of Indians on Indian reservations, or *to limit the coverage of a statute as important as the Sherman Act, a court would require an unambiguous expression of intent to make such a change;* without such an expression it is reasonable to believe that inadvertence, rather than an intent to repeal, is the actual explanation for the broad language that arguably changes the old rule. . . . [426 U.S. at 164; footnotes omitted; emphasis added.]

earlier and later statutes are irreconcilable.'" *Tennessee Valley Authority* v. *Hill*, 437 U.S. 153, 190, *quoting Morton* v. *Mancari*, 417 U.S. 535, 550.

The antitrust laws represent our "fundamental national economic policy." *Carnation Co.* v. *Pacific Westbound Conference*, 383 U.S. 213, 218. The antitrust laws (and specifically the Sherman Act) have been characterized by this Court as "the Magna Carta of free enterprise, . . . as important to the preservation of economic freedom and our free-enterprise system as the Bill of Rights is to the protection of our fundamental personal freedoms." *City of Lafayette* v. *Louisiana Power & Light Co.*, 435 U.S. 389, 398. Mr. Justice Black, writing for the Court in *Northern Pacific Railway Co.* v. *United States*, 356 U.S. 1, 4, perhaps best articulated the principle:

> The Sherman Act was designed to be a comprehensive charter of economic liberty aimed at preserving free and unfettered competition as the rule of trade. It rests on the premise that the unrestrained interaction of competitive forces will yield the best allocation of our economic resources, the lowest prices, the highest quality and the greatest material progress, while at the same time providing an environment conducive to the preservation of our democratic political and social institutions. But even were that premise open to question, the policy unequivocally laid down by the Act is competition.

Thus, there can be no doubt that the "clear and manifest" intention standard must be met when the issue is implied repeal of the antitrust laws. *See United States* v. *Borden Co.*, 308 U.S. 188, 198-99 ("intention of the legislature to repeal must be 'clear and manifest'"); *Gordon* v. *New York Stock Exchange, Inc.*, 422 U.S. 659, 682 ("[r]epeal of the antitrust laws by implication is not favored and not casually to be allowed"); *California* v. *Federal Power Commission*, 369 U.S. 482, 485 ("[i]mmunity from the antitrust laws is not lightly implied"). *See also Federal Maritime*

Commission v. *Seatrain Lines, Inc.*, 411 U.S. 726, 733. As Mr. Justice Brennan wrote, "[t]he presumption against repeal by implication reflects the understanding that the antitrust laws establish overarching and fundamental policies . . . ." *City of Lafayette* v. *Louisiana Power & Light Co.*, 435 U.S. 389, 399.

Given this heavy burden, advocates of implied repeal have frequently advanced the existence of a federal regulatory scheme as requiring the conclusion that Congress intended to repeal the antitrust laws. More than the mere presence of some scheme of federal regulation must, however, be shown to justify the ouster of antitrust protection for either the regulated industry or specific activities subject to federal regulation. *See Carnation Co.* v. *Pacific Westbound Conference*, 383 U.S. 213, 218 (". . . we cannot lightly assume that the enactment of a special regulatory scheme for particular aspects of an industry was intended to render the more general provisions of the antitrust laws wholly inapplicable to that industry"); *Otter Tail Power Co.* v. *United States*, 410 U.S. 366, 372 ("[a]ctivities which come under the jurisdiction of a regulatory agency nevertheless may be subject to scrutiny under the antitrust laws"). Recognizing the "indispensable role of antitrust policy in the maintenance of a free economy," this Court has concluded that "[r]epeals of the antitrust laws by implication from a regulatory statute are strongly disfavored, and have only been found in cases of plain repugnancy between the antitrust and regulatory provisions." *United States* v. *Philadelphia National Bank*, 374 U.S. 321, 348, 350-51 (footnotes omitted). Moreover, any implied immunity must be narrowly limited to that "necessary to make the [regulatory scheme] work and even then only to the minimum extent necessary." *Silver* v. *New York Stock Exchange*, 373 U.S. 341, 357; *see Cantor* v. *Detroit Edison Co.*, 428 U.S. 579, 596 n.34; *Gordon* v. *New York Stock Exchange, Inc.*, 422 U.S. 659, 682; *United States* v. *National Association of Securities Dealers, Inc.*, 422 U.S. 694, 734;

Federal Maritime Commission v. *Seatrain Lines, Inc.*, 411 U.S. 726, 733.

In the remainder of this brief, we will undertake to show (A) that there is no "clear and manifest" indication of Congressional intent to repeal the antitrust laws, either in the language of the Planning Act or in its legislative history, and (B) that there is no irreconcilable conflict between the Planning Act and the antitrust laws. In failing to recognize these points, the decisions below have fundamentally misconstrued the implied immunity doctrine.

A. Neither the language nor the legislative history of the Planning Act gives any "clear and manifest" indication that Congress intended implied repeal.

Neither the legislative history of the Planning Act nor the Act itself provides any indication that Congress intended to exempt respondents' action from antitrust scrutiny. The Court of Appeals nevertheless presumed such intent, relying largely on the general observation by Congress that the health care industry had failed to "respond to classic marketplace forces" and its concern with rapidly rising health care costs. (628 F.2d at 1056, J.A. at 209a.) In addition, it gave great weight to comments made by a single Representative long after the Act was passed to support its conclusion that Blue Cross' voluntary action was immune under the antitrust laws. (628 F.2d at 1056-57, J.A. at 211a-213a.) None of these indicia of purported Congressional intent, however, constitute the type of "unequivocally declared Congressional purpose" which this Court has held is required before implied repeal of the antitrust laws may be presumed. *See Pan American World Airlines, Inc.* v. *United States*, 371 U.S. 296, 305.

The best evidence of Congressional intent, of course, is the statute itself. *Greyhound Corp.* v. *Mt. Hood Stages, Inc.*, 437 U.S. 322, 330, *quoting Blue Chip Stamps* v. *Manor Drug Stores*, 421 U.S. 723, 756 (Powell, J., concurring)

("The starting point in every case involving construction of a statute is the language itself."). Nothing in the language of the Planning Act demonstrates any Congressional desire to oust the antitrust laws; indeed, the statute itself compels the opposite conclusion.

While not mentioned in either opinion below, Congress specifically included in the Planning Act a limited immunity from antitrust (and other) damage actions for individual members and employees of HSAs.[14] Significantly, that provision did not include any immunity for other private parties. In 1979, that provision was the subject of more consideration, and the exemption was broadened—but only to include the HSA itself.[15] The fact that Congress provided only

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[14] *See* National Health Planning and Resources Development Act of 1974, Pub. L. No. 93-641, § 1512(b)(4), 88 Stat. 2225 (1974), which reads:

> No individual who, as a member or employee of a health systems agency, shall, by reason of his performance of any duty, function, or activity required of, or authorized to be undertaken by, the agency under this title, be liable for the payment of damages under any law of the United States or any State (or political subdivision thereof) if he has acted within the scope of such duty, function, or activity, has exercised due care, and has acted, with respect to that performance, without malice toward any person affected by it.

[15] *See* Health Planning and Resources Development Amendments of 1979, Act of October 4, 1979, Pub. L. No. 96-79, § 110(d)(1), 93 Stat. 603-04 (1979), which reads:

> (4) LIABILITY.—
>
> (A) IN GENERAL.—Except as provided in subparagraph (B)—
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> (i) a health systems agency shall not, by reason of the performance of any duty, function, or activity, required of, or authorized to be undertaken by, the agency, be liable for the payment of damages under any law of the United States or any State (or political subdivision thereof) if the member of the governing body of the agency or employee of the agency who acted on behalf of the agency in the performance of such duty, function, or activity acted within the scope of his duty, function, or activity as such a member or employee, exercised due

a narrow and limited immunity is strong evidence that it intended no broader immunity to be created by implication. *See Federal Maritime Commission* v. *Seatrain Lines, Inc.*, 411 U.S. 726, 733; *Carnation Co.* v. *Pacific Westbound Conference*, 383 U.S. 213, 216-19; *California* v. *Federal Power Commission*, 369 U.S. 482, 485; *Cain* v. *Air Cargo, Inc.*, 599 F.2d 316, 320 (9th Cir. 1979). Thus, in *United States* v. *Borden Co.*, 308 U.S. 188, 201, this Court found that the explicit immunity provisions contained in the Agricultural Marketing Agreement Act defined the extent to which Congress intended to displace the Sherman Act:

> If Congress had intended to grant any further immunity, Congress doubtless would have said so.

This reasoning is clearly applicable here.

This conclusion becomes inescapable when one considers the fact that Congress *considered and rejected* several immunity provisions broader than that ultimately enacted—though not as sweeping as that urged by respondents and found by the courts below. The American Health Planning Association argued that "organizations, their employees,

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care, and acted without malice toward any person affected by it; and

(ii) no individual member of the governing body of a health systems agency or employee of a health systems agency shall, by reason of his performance on behalf of the agency of any duty, function, or activity required of, or authorized to be undertaken by, the agency, be liable for the payment of damages under any law of the United States or any State (or political subdivision of a State) if he believed he was acting within the scope of his duty, function, or activity as such a member or employee, and, with respect to such performance, acted without gross negligence or malice toward any person affected by it.

(B) EXCEPTION.—Subparagraph (a) does not apply with respect to civil actions for bodily injury to individuals or physical damages to property brought against a health systems agency or any member of the governing body of or employee of such an agency.

Board members and agents who voluntarily follow the recommendation of a SHPDA or HSA made in conformance with the requirements of this act" should be immunized. Similarly, the American Medical Association urged that "[a] new section . . . be added to exempt actions taken in meeting the requirements of the Act from federal antitrust laws." *See* Health Planning and Resources Development Amendments of 1979: Hearings before the Subcommittee on Health and the Environment of the Committee on Interstate and Foreign Commerce on H.R. 3041 and 3167, 96th Cong., 1st Sess. 187-88, 641 (1979). Significantly, the Conference Committee rejected even a more limited Senate amendment, which would have extended immunity to "agents and consultants" of the HSA. *See* H. Conf. Rep. No. 420, 96th Cong., 1st Sess. 66, *reprinted in* [1979] U.S. Code Cong. & Ad. News 1422, 1434. This record is hardly consistent with an assumption that Congress intended the wholesale repeal of the antitrust laws in this area.

Indeed, the very language of the provision on which the courts below primarily relied for their conclusions of Congressional intent demonstrates that Congress recognized the existence of finite limits on the cooperation of private entities with an HSA:

> A health systems agency shall implement its HSP [Health Systems Plan] and AIP [Annual Implementation Plan], and in implementing the plans it shall perform at least the following functions:
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> (1) The agency shall seek, *to the extent practicable*, to implement its HSP and AIP with the assistance of individuals and public and private entities in its health service area. (42 U.S.C. §300*l*-2(c)(1); emphasis added.)

Unless we are to assume they are mere surplusage, the words "to the extent practicable" must demonstrate a Congressional understanding that private "assistance" would not always be available. Boycotts, bribery, threats, and other forms of coercion might be effective tools in the

hands of an HSA or private parties seeking a particular result, but they are forbidden to private and public entities alike by criminal statutes. Obviously, Congress recognized that illegal coercive conduct by private entities, even if thought useful by or helpful to the HSA, would not be desirable and should not be encouraged.[16]

Again, what Congress specifically did not do is instructive. As originally passed by the House of Representatives, the Planning Act would have allowed the states to forbid private insurance reimbursement for certain capital expenditures that were not approved by local planning agencies. (*See, infra,* at p. 37.) This provision was rejected by the conference committee, and was not included in the Planning Act as ultimately adopted. It hardly seems likely that Congress rejected a regulatory provision commanding certain conduct, but intended similar private collusive conduct, without oversight by or the protection of government regulators, to be totally immune from antitrust attack.

On this record, a finding that Congress had a "clear and manifest" intention to create a blanket exemption from the antitrust laws for actions arguably consistent with the policy goals of the Planning Act has no ascertainable foundation.[17] The record shows that Congress knew what immunity it wanted to give and did so.

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[16] Of course, private cooperation could be limited by constraints other than statutory prohibitions. The private interests of individual providers might not always be consistent with the efforts or goals of local planning bureaucracies. Congress obviously was aware of this possibility; nevertheless, it left neither the HSA nor any other agency with any regulatory power to compel "assistance." It would be incongruous, to say the least, if the Planning Act were interpreted to permit private cartels to exercise powers specifically withheld from any agency (private or public) involved in the planning process created by the Act.

[17] The comments by Representative Rogers so heavily relied on by the courts below were made during debates on amendments to

B. The Planning Act and the antitrust laws are not irreconcilable.

As we have contended above, nothing in either the language or the legislative history of the Planning Act suggests a Congressional intention to repeal the antitrust laws in the health care industry. As this Court has emphasized, in such circumstances "[t]he courts are not at liberty to pick and choose among congressional enactments, and when two statutes are capable of co-existence, it is the duty of the courts, absent a clearly expressed congressional intention to the contrary, to regard each as effective." *Morton* v. *Mancari*, 417 U.S. 535, 551. Only when there is "plain repugnancy" between two statutes can the doctrine of implied repeal be appropriately applied. *United States* v. *Philadelphia National Bank*, 374 U.S. 321, 348, 350-51; *see Tennessee Valley Authority* v. *Hill*, 437 U.S. 153, 190-93; *Radzanower* v. *Touche Ross & Co.*, 426 U.S. 148, 154-55; *Silver* v. *New York Stock Exchange*, 373 U.S. 341, 357; *Posadas* v. *National City Bank*, 296 U.S. 497, 503-05. As this Court observed in *Gordon* v. *New York Stock Exchange, Inc.*, 422 U.S. 659, 683,

> Concluding that the proper approach to the problem was to reconcile the operation of the antitrust laws with a regulatory scheme, the Court [in *Silver*] established a "guiding principle" for the achievement of

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the Act proposed in 1978 but never enacted. *See* H.R. 11488, 95th Cong., 2d Sess. (1978). Obviously, the views of a subsequent Congress form a hazardous basis for inferring the intent of an earlier one (*see United States* v. *Philadelphia National Bank*, 374 U.S. 321, 348-49); *a fortiori*, the words of a single Congressman in an unsuccessful amendment effort hardly provide a sound basis for inferring that his remarks reflect the intent of Congress in passing the original legislation. *See, e.g., Tennessee Valley Authority* v. *Hill*, 437 U.S. 153, 209 (Powell, J., dissenting), citing *Regional Rail Reorganization Cases*, 419 U.S. 102, 132 ("We have held properly that post-enactment statements by individual Members of Congress as to the meaning of a statute are entitled to little or no weight.").

> this reconciliation. Under this principle, "[r]epeal is to be regarded as implied only if necessary to make the [regulatory scheme] work, and even then only to the minimum extent necessary."

The Court of Appeals ignored this "guiding principle," and made no attempt to reconcile the Planning Act with the antitrust laws. Instead, without supportive reasoning or analysis of the key provision at issue, it concluded that "the Act and the regulatory scheme clearly call for the action which has now become the basis of an antitrust claim." (628 F.2d at 1055-56, J.A. at 209a.) This was both factual and legal error.

1. *The Planning Act neither requires nor authorizes the conduct at issue here.*

The Planning Act was enacted "to facilitate the development of recommendations for a national health planning policy, to augment areawide and State planning for health services, manpower, and facilities, and to authorize financial assistance for the development of resources to further that policy." 42 U.S.C. § 300k(b). To accomplish that purpose, the Act established, through a series of grants made by the Department of Health, Education and Welfare [now the Department of Health and Human Services ("DHHS")] a nationwide, three-tiered system of health planning and development organizations (*see* 42 U.S.C §§ 300*l*-1, 300m, 300m-3).[18] It also encouraged the states to establish their

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[18] The first of these agencies is the Health Systems Agency ("HSA"), which may be a non-profit private corporation, a public regional planning body, or a single unit of local government. 42 U.S.C. § 300*l*(b)(1). The HSA involved in this case, MAHSA, was a private corporation. The primary functions of the HSA are to develop health plans for their respective service areas, and to make recommendations regarding certificate of need applications, and the need for existing services. 42 U.S.C. §§ 300*l*-2(b),(f),(g)(1) and (2).

The second agency, the State Health Planning and Development Agency ("State Agency"), is the public agency selected by the

own "certificate of need" programs to regulate the provision of new or expanded health care services (*see* 42 U.S.C. § 300m).[19] The duties of the Secretary of DHHS under this statutory scheme are very limited,[20] and include no "regulatory" functions whatever. Indeed, as is clearly indicated in the legislative history of the Act, the Planning Act established a framework for the future development of a national planning policy in which the only truly "regulatory" function would be served by each state pursuant to its own

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Governor of each state to serve as the designated planning agency of the state. This agency, in addition to preparing a state health plan, also administers the state's certificate of need program under which the addition of new and expanded health care services is regulated by the state. 42 U.S.C. § 300m *et seq.*

The third agency, the Statewide Health Coordinating Council ("SHCC"), coordinates the plans of the HSAs within the state, and revises and approves or disapproves the state health plan submitted by the State Agency. 42 U.S.C. § 300m-3. It is not directly involved in the state certificate of need process.

[19] Under the Act, a state is not required to participate in the planning program, but it faces the loss of various grants, loans or contract monies available from the federal government if it fails to do so. 42 U.S.C. § 300m(d).

[20] The primary responsibilities of the Secretary are to issue guidelines concerning national health planning goals (*see* 42 U.S.C. § 300k-1); to establish health service areas (*see* 42 U.S.C. § 300*l*); and to enter into designation agreements for HSAs and State Agencies (*see* 42 U.S.C. §§ 300*l*-4, 300m). The Planning Act also establishes a National Council on Health Planning and Development to advise and make recommendations to the Secretary for the development of national health planning guidelines (*see* 42 U.S.C. § 300k-3), pursuant to which the Secretary has promulgated planning guidelines intended to be used by the HSAs in developing their health plans (*see* 42 C.F.R. §§ 121.201 *et seq.* (1979)).

individualized "certificate of need" legislation.[21] In fact, the only "regulatory" feature of the entire planning scheme is the certificate of need legislation enacted by the states.[22] The Planning Act, by itself, does not create a federal regulatory scheme nor does it vest pervasive regulatory powers in any federal agency.

The courts below relied primarily on section 300*l*-2(c)(1) as establishing the authority of the Planning Act, and the exclusion of antitrust jurisdiction, for the conduct challenged here. Inexplicably, however, neither court gave any particular attention to the actual words used by Congress in that provision. It reads as follows:

> A *health systems agency* shall implement its HSP [Health Systems Plan] and AIP [Annual Implementation Plan], and in implementing the plans it shall perform at least the following functions:
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> (1) *The agency* shall seek, to the extent practicable, to implement its HSP and AIP with the assistance of

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[21] The Senate Report reads:

> Although the keystone to the health planning effort envisioned . . . is the area-wide health planning agency, certain functions are more appropriately performed at the State level. Specifically . . . the performance of regulatory functions are most appropriately carried out at the State level . . . [This] function can appropriately be carried out only by an agency of State Government. The Committee bill is intended to encourage the establishment of a delicate but workable balance among the varied interests operating in the health industry today. For that reason, rather detailed and explicit enumerations of the health planning and regulatory functions which can be carried out at the State level are contained in the legislation. To a very great extent, the manner in which those [regulatory] functions are performed is left to the discretion of the individual Governors of the states involved. [S. Rep. No. 1285, 93d Cong., 2d Sess. 52, *reprinted in* [1974] U.S. Code Cong. & Ad. News 7842, 7891.]

[22] As noted *supra* at p.4 n.3, at all times here pertinent, Missouri had no compulsory certificate of need program, nor had it designated a State Agency.

> individuals and public and private entities in its health service area. (42 U.S.C. § 300*l*-2(c)(1); emphasis added).

Even a casual reading of this language shows that it neither calls for nor authorizes any conduct by private parties, much less a boycott by a dominant third-party payor acting in concert with others. The provision plainly speaks to "the agency" and not to private entities; to the extent this provision requires, authorizes or encourages *any* conduct, it is *only* conduct by the agency itself. Here, the record clearly shows that the action complained of was *not* taken *by, or at the request of,* any health systems agency. As respondent BCA itself has conceded, the Blue Cross policy was "unilaterally adopted" (BCA Br. in Opp. at 11),[23] and, as the court below found, it was totally voluntary (628 F.2d at 1057, J.A. at 213a). Neither MAHSA nor any other federal or state government agency required respondents to act as they did, nor did MAHSA or any other government agency have the legal authority to approve or sanction the boycott, even if asked.

This provision is typical; the Planning Act nowhere compels, mandates or authorizes anticompetitive action by private parties. The Act does encourage local and state planning agencies to seek the cooperation of private entities, and the Act obviously envisioned communications with private entities and individuals. But it is too much by far to say that the Planning Act in any way—much less "clearly" —authorized, approved or even encouraged violations of other federal statutes by private parties acting of their own volition outside the framework created by the Act.

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[23] While BCA may mean to exclude itself and others from the decision by this language, which begs the ultimate question at stake in this litigation, at a minimum this admission concedes the conduct challenged here was not undertaken pursuant to any governmental mandate.

This Court has long been unsympathetic to "private government," whatever its motives or form. *See, e.g., California Retail Liquor Dealers Association* v. *Midcal Aluminum, Inc.*, 445 U.S. 97; *Fashion Originators' Guild* v. *Federal Trade Commission*, 312 U.S. 457; *United States* v. *Socony-Vacuum Oil Co.*, 310 U.S. 150; *American Medical Association* v. *United States*, 130 F.2d 233 (D.C. Cir. 1942), *aff'd*, 317 U.S. 519.

In *Fashion Originators' Guild*, for example, manufacturers of women's clothing combined to boycott retailers who sold clothing that Guild members believed was copied from their original designs. The Guild argued that the copying violated state laws and that their activity was thus consistent with and supportive of state law. This Court held that this effort violated the antitrust laws, describing the Guild as "in reality an extra-governmental agency, which prescribes rules for the regulation and restraint of interstate commerce, and provides extra-judicial tribunals for determination and punishment of violations, and 'thus trenches upon the power of the national legislature, and violates the statute.' *Addyston Pipe and Steel Co.* v. *United States*, 175 U.S. 211, 242." 312 U.S. at 465-66. As for the claim of assisting the enforcement of state law, the Court held that "even if copying were an acknowledged tort under the law of every state, that situation would not justify petitioners in combining together to regulate and restrain interstate commerce in violation of federal law." 312 U.S. at 468.

Even where government agencies have encouraged private regulation, this Court has struck it down where it had no explicit Congressional authorization. In *Socony*, for example, defendants argued that federal government officers were aware of and had approved their scheme to stabilize the price of distress gasoline. The Court rejected the contention that this conferred antitrust immunity (310 U.S. at 226-27):

> For Congress had specified the precise manner and method of securing immunity. None other would suffice.

> Otherwise national policy on such grave and important issues as this would be determined not by Congress nor by those to whom Congress had delegated authority but by virtual volunteers.

Most recently, this Court found no antitrust immunity even where a state legislature had enacted a statute specifically directing the conduct attacked. *California Retail Liquor Dealers Association* v. *Midcal Aluminum, Inc.*, 445 U.S. 97. It is not enough that the challenged restraint is "clearly articulated and affirmatively expressed as state policy," said this Court; it must also be " 'actively supervised' by the State itself." 445 U.S. at 105. This holding was synthesized from a series of opinions by this Court, including decisions finding no immunity from antitrust attack for conduct by "a state agency for some limited purposes" (*Goldfarb* v. *Virginia State Bar*, 421 U.S. 773, 791), or for conduct "passively accepted" by a state agency (445 U.S. at 104, *citing Cantor* v. *Detroit Edison Co.*, 428 U.S. 579), and finding antitrust immunity for rules promulgated by the Supreme Court of a state only because they were "subject to pointed reexamination by the policymaker—the Arizona Supreme Court—in enforcement proceedings" (445 U.S. at 104-05, *quoting Bates* v. *State Bar of Arizona*, 433 U.S. 350, 362).[24] *Cf. Gibson* v. *Berryhill*, 411 U.S. 564 (find-

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[24] Although the court below apparently viewed the "state action" doctrine and its standards as being totally irrelevant in the context of this case (*see* 628 F.2d at 1054-55; J.A. at 206a-207a), the standards used by this Court in the implied repeal and state action areas are, in fact, not dissimilar. *See Cantor* v. *Detroit Edison Co.*, 428 U.S. 579, 597-98. Certainly, the lower courts have freely applied the standards applicable to the state action doctrine in the implied immunity context. *See, e.g., Essential Communications Systems, Inc.* v. *American Telephone & Telegraph Co.*, 610 F.2d 1114, 1124 (3d Cir. 1979); *City of Mishawaka* v. *Indiana & Michigan Electric Co.*, 560 F.2d 1314, 1320 (7th Cir. 1977), *cert. denied*, 436 U.S. 922. *See also* Note, "Antitrust and Regulated Industries: A Critique

ing a state licensing board so biased by the pecuniary interest of its members that its proceedings were constitutionally defective).

There is a common thread here—the importance of independent public decisionmaking—and this notion has been repeatedly mentioned in the regulatory implied repeal cases. Voluntary private conduct is not automatically immunized from antitrust scrutiny simply because it falls within the jurisdiction of a regulatory agency, *see Otter Tail Power Co.* v. *United States,* 410 U.S. 366, or even if it is actually approved by a public agency with clear regulatory authority. *See, e.g., Cantor* v. *Detroit Edison Co.,* 428 U.S. 579, 592-95; *United States* v. *Philadelphia National Bank,* 374 U.S. 321, 350-52; *California* v. *Federal Power Commission,* 369 U.S. 482, 485; *United States* v. *Radio Corp. of America,* 358 U.S. 334, 350-52.

Here, there is no public agency with the power to approve or authorize, and thus there is no actual agency approval—either at the federal or state level. Nor is there any regulatory conflict of the type which this court has found to justify a conclusion of implied repeal. For example, in *Gordon* v. *New York Stock Exchange, Inc.,* 422 U.S. 659, this Court concluded that the Securities and Exchange Act of 1934, which authorized the Securities and Exchange Commission to approve or disapprove exchange commission rates, impliedly repealed the antitrust laws as to the exchange's system of fixed commission rates. This Court found that the relevant federal statute clearly contemplated that the securities exchanges would engage in the very conduct challenged subject to the supervision and review of the SEC. Thus, this Court noted that "the Congress gave clear authority to the 'fixing of reasonable rates of commission'" under SEC supervision (422 U.S. at 681), and

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and Proposal for Reform of the Implied Immunity Doctrine," 57 *Tex. L. Rev.* 751 (1979).

concluded that "to deny antitrust immunity with respect to commission rates would be to subject the exchanges and their members to conflicting standards." 422 U.S. at 689. As Mr. Justice Douglas explained in his concurring opinion (422 U.S. at 692):

> The antitrust laws are designed to safeguard a strong public interest in free and open competition, and immunity from those laws should properly be implied only when some equivalent mechanism is functioning to protect that public interest.

Conversely, where the private party is the real decision-maker, and where ouster of the antitrust laws will leave the public with neither antitrust nor adequate regulatory protection, this Court has never found a Congressional intent to exempt such conduct completely from antitrust scrutiny. *See Otter Tail Power Co.* v. *United States*, 410 U.S. 366, 374-75; *Carnation Co.* v. *Pacific Westbound Conference*, 383 U.S. 213, 219; *United States* v. *Philadelphia National Bank*, 374 U.S. 321, 351; *Silver* v. *New York Stock Exchange*, 373 U.S. 341, 353-54, 357.[25] *Cf. California Retail Liquor*

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[25] As noted by this Court in *Gordon* v. *New York Stock Exchange, Inc.*, 422 U.S. 659, 683-84:

> In *Silver*, the Court concluded that there was no implied repeal of the antitrust laws in that factual context because the Exchange Act did not provide for SEC jurisdiction or review of particular applications of rules enacted by the exchanges. . . . [*T*]*here was no governmental oversight of the exchange's self-regulatory action, and no method of insuring that some attention at least was given to the public interest in competition.* (Emphasis added.)

The case for implied repeal is even less compelling in this boycott case than it was in *Silver*. At least in *Silver*, the SEC exercised general oversight over the activities of the exchanges, even though it did not review the particular applications of the rules enacted by them. In this case, no federal agency has any comparable general supervisory authority over the operations of either BCA or Blue Cross.

Dealers Association v. *Midcal Aluminum, Inc.*, 445 U.S. 97, 104-06; *Cantor* v. *Detroit Edison Co.*, 428 U.S. 579, 592-95. Yet this is exactly what the court below did: It created an antitrust exemption for purely private conduct over which there was no public oversight of any kind.[26]

"When . . . relationships are governed in the first instance by business judgment and not regulatory coercion, courts must be hesitant to conclude that Congress intended to override the fundamental national policies embodied in the antitrust laws." *Otter Tail Power Co.* v. *United States*, 410

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[26] The anticompetitive potential here is clear, and even more severe than that generally inherent in the planning process. Even where governmental and quasi-governmental bodies are involved, the competitive dangers are very real:

> If health planners and regulators have generally been liberal in granting certificates-of-need to existing institutions seeking to upgrade and expand their services, they have been relatively stingy about investments by would-be newcomers to the market. . . .
>
> Of course, the strongly political character of planning and regulation, explicitly built into the HSA structure by "consumer" and "provider" representation requirements and implicit in state-level regulation, has encouraged decisions that reflect the interests of established providers. Health planners and regulators, even if they are not "captured" by the regulated institutions, may harbor a preference for stability and cooperative problem solving over what they see as an unruly competitive marketplace.
>
> Thus, they may protect providers from competition in order to gain their cooperation and support. Planners and regulators may also prevent "cream-skimming" by new competitors so that existing providers can continue to price some services above competitive levels. The resulting extraordinary profits may then be used to subsidize unprofitable services that the regulators deem desirable. Protectionist regulation is, in short, used to perpetuate internal subsidies, a regulatory practice that Richard Posner has labeled "taxation by regulation." [C. Havighurst and G. Hackbarth, "Competition and Health Care: Planning for Deregulation," *Regulation*, May/June 1980, at 41.]

U.S. 366, 374[27]; *see Federal Maritime Commission* v. *Seatrain Lines, Inc.*, 411 U.S. 726, 733; *United States* v. *Radio Corp. of America*, 358 U.S. 334.[28] Here, Blue Cross and BCA, in concert with their co-conspirators, established a private regulatory system with no right of appeal and no judicial review. Their action was directly contrary to the

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[27] *Otter Tail* is especially pertinent, because it too deals with "voluntary" actions on the part of private parties. At issue in that case were Otter Tail's consistent refusals to deal with selected municipalities in its market area. Otter Tail claimed that its refusals to deal were immune from antitrust scrutiny because the Federal Power Commission had the authority to regulate certain aspects of the industry. This Court, finding that the Federal Power Act did not confer authority on the FPC to compel involuntary interconnections of power, and that Otter Tail's action was essentially voluntary and "governed in the first instance by business judgment and not regulatory coercion" (410 U.S. at 374), held that the Federal Power Act did not impliedly repeal the antitrust laws.

Here, respondents claim that their collective refusal to deal is immune from antitrust scrutiny because a system of regulation could have commanded the same result. Obviously, the case for implied repeal is far weaker here. Respondents' conduct was not only not coerced; it was not subject to supervision or review of any kind by any public agency—state or federal.

[28] There, in rejecting RCA's claim of implied immunity, this Court reasoned:

> Appellees, like unregulated business concerns, made a business judgment as to the desirability of the exchange. Like unregulated concerns, they had to make this judgment with knowledge that the exchange might run afoul of the antitrust laws. Their decision varied from that of an unregulated concern only in that they also had to obtain the approval of a federal agency. . . . In every sense, the question faced by the parties was solely one of business judgment (as opposed to regulatory coercion). . . . [358 U.S. at 350-51.]

In this case, Blue Cross and its co-conspirators neither sought nor obtained the approval of any federal or state agency. Even if such approval had been sought and given, however, it would not immunize Blue Cross from antitrust liability. *See United States* v. *Socony-Vacuum Oil Co.*, 310 U.S. 150, 225-228.

decision of the State of Missouri, in the exercise of its sovereign powers, not to create a health planning regulatory scheme and not to require any further regulatory approvals of petitioner, and contrary to the Congressional determination not to require any action in support of the Act by third party payors.[29]

But for this litigation, petitioner has no possibility of any relief from this collective action of Blue Cross, BCA and others, for no mechanism for administrative or judicial review of private "need" reviews exists under any law.[30]

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[29] It is interesting to note that BCA itself had attempted to convince the Congress that it should legitimize the very conduct under attack here. *See* National Health Planning and Development Act, 1974: Hearings on S. 2994, S. 3139, S. 2796 and Related Bills Before the Subcommittee on Health of the Committee on Labor and Public Welfare, 93d Cong., 2d Sess. 545-46, 582-83, 585-86, Part 2 (1974) (statement of D. Eugene Sibery, Executive Vice President, Blue Cross Association). BCA was unsuccessful in this effort, but apparently seeks to obtain the same result through private regulation. For BCA (and Blue Cross) to argue that they are merely trying to serve the policies of the Planning Act, when their action is flatly inconsistent with a Congressional decision made during the passage of that Act, is hardly persuasive.

[30] This Court has often identified the lack of opportunity for judicial review of regulatory determinations as a basis for determining whether or not implied repeal is appropriate. For example, in *United States* v. *Philadelphia National Bank*, 374 U.S. 321, 351-52, this Court concluded that the Bank Merger Act had not impliedly repealed the antitrust laws as to the merger at issue, in part because there was no opportunity for judicial review of the administrative decision approving the merger. Similarly, in *Silver* v. *New York Stock Exchange*, 373 U.S. 341, this Court rejected application of the implied repeal doctrine to the denial by the exchange of wire connections to a nonmember, in large part on the ground that there was no opportunity for either judicial or administrative review of the exchange's self-regulatory activity:

> There is nothing built into the regulatory scheme which performs the antitrust function of insuring that an exchange will

The only possible review of the group boycott aimed at petitioner is by an antitrust court. The Planning Act provides no basis for closing this last door.

2. *Antitrust immunity for voluntary, private, anticompetitive conduct is not necessary to make the Planning Act work.*

The implied repeal doctrine has frequently been advanced as a way of resolving a "conflict" between the antitrust laws and the statutory responsibilities of federal regulatory agencies. As described in *United States* v. *National Association of Securities Dealers, Inc.*, 422 U.S. 694, 734:

> [I]mplied immunity [has been found] in particular and discrete instances to assure that the *federal agency entrusted with regulation in the public interest* could carry out that responsibility free from the disruption of conflicting judgments that might be voiced by courts exercising jurisdiction under the antitrust laws. (Emphasis added.)

As we have seen, however, the Planning Act neither commands nor authorizes *any* private anticompetitive conduct, much less boycotts by dominant private third party payors. In fact, nothing in the Planning Act contemplates "regulation" by a "federal agency" that would be at all affected by antitrust enforcement.

> not in some cases apply its rules so as to do injury to competition which cannot be justified as furthering legitimate self-regulative ends. . . . Since the antitrust laws serve, among other things, to protect competitive freedom, i.e., the freedom of individual business units to compete unhindered by the group action of others, it follows that the antitrust laws are peculiarly appropriate as a check upon anticompetitive acts of exchanges . . . [*Id.* at 358-60.]

Conversely, in *Gordon* v. *New York Stock Exchange, Inc.*, 422 U.S. 659, this Court held implied repeal appropriate, specifically noting that a finding of implied repeal was possible only since the commission rate practices at issue were subject to SEC scrutiny and approval, and the SEC determinations were subject to judicial review under the Administrative Procedure Act. *Id.* at 689-90.

Of all the cases decided by this Court on the issue of implied repeal, *Silver* v. *New York Stock Exchange,* 373 U.S. 341, is perhaps the closest on the facts. In *Silver,* the plaintiff was a registered nonmember broker-dealer. He alleged that the defendant Exchange had conspired with its members to deny him access to private wire connections and a stock ticker service. These services were essential to his ability to compete on an equal basis with competitor firms. The Exchange contended that its actions were immune from antitrust scrutiny under the implied repeal doctrine, but this Court disagreed. Noting that the challenged boycott, "in a context free from other federal regulation, [would] constitute a *per se* violation of § 1 of the Sherman Act" (373 U.S. at 347),[31] this Court held that the boycott was not immune from antitrust challenge because the SEC, while it had general regulatory power over the exchanges, had no power to supervise particular applications of the rules of the Exchange.

The Court of Appeals had held that the Exchange was exempted from antitrust constraints because it was acting "within the general scope of [its] authority . . . as defined by the 1934 Act." 373 U.S. at 346. This Court rejected that blunt approach:

> Contrary to the conclusions deduced by the courts below, the proper approach to this case, in our view, is an analysis which reconciles the operations of both statutory schemes with one another rather than holding one completely ousted. . . . Repeal is to be regarded as implied only if necessary to make the Securities Exchange Act work, and even then only to the minimum extent necessary. This is the guiding principle to reconciliation of the two statutory schemes.[32]

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[31] As this Court put it (373 U.S. at 348 n.5): "A valuable service germane to petitioners' business and important to their effective competition with others was withheld from them by collective action. That is enough to create a violation of the Sherman Act."

[32] *See also Cantor* v. *Detroit Edison Co.,* 428 U.S. 579, 597 n.37 ("Recent cases make it clear that the relevant aspect of the

In *Silver*, the SEC had no power to review the conduct at issue. Thus, this Court found, "the question of antitrust exemption does not involve any problem of conflict or coextensiveness of coverage with the agency's regulatory power." 373 U.S. at 358. Nor could this Court find anything "built into the regulatory scheme which performs the antitrust function of insuring that an exchange will not in some cases apply its rules so as to do injury to competition which cannot be justified as furthering legitimate self-regulative ends." *Id.* Thus, said this Court, "[a]pplicability of the antitrust laws . . . rests on the need for vindication of their positive aim of insuring competitive freedom. Denial of their applicability would defeat the Congressional policy reflected in the antitrust laws without serving the policy of the Securities Exchange Act." 373 U.S. at 360.

Here, as in *Silver*, a dominant market force has, in concert with its members and as part of an internal "self-regulatory" scheme, denied a nonmember access to contractual relationships essential to its ability to compete in the market. This is a much clearer case than *Silver*, however, for here the private "self-regulation" is wholly volitional, neither contemplated nor mandated by a federal statute. Moreover, there is no federal regulatory agency which has any power to exercise general regulatory oversight over the boycotters, much less any power to review and control the challenged conduct itself. Thus, there is no "problem of conflict or coextensiveness of coverage" with any federal agency.

Certainly, there can be no argument here that implied repeal is "necessary to make the [Planning Act] work." As the language and legislative history of the Planning Act clearly show, the central focus of the Planning Act scheme

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agency's jurisdiction must be sufficiently central to the purposes of the enabling statute so that implied repeal of the antitrust laws is 'necessary to make the [regulatory scheme] work.' ").

lies in the state certificate of need programs authorized and funded by the Planning Act—not in any coercive actions taken by Blue Cross or other third party payors to limit payments to providers. Section 1421(d) of the House-passed version of the Act would have allowed the states to require third party payors to limit reimbursement payments to health care provider institutions if the institution had not received a favorable "need" determination from the state planning agency, as an alternative to establishing mandatory certificate of need programs.[33] This approach was rejected in conference. *See* H. Conf. Rep. No. 1640, 93d Cong., 2d Sess. 78, *reprinted in* [1974] U.S. Code Cong. & Ad. News 7983, 7987. Thus, Congress refused to adopt a plan of action very similar to that at issue here as a component of the scheme enacted to achieve the goals of the Planning Act. Given this fact, it can hardly be argued that the implementation of respondents' volitional "need" determination policy is at all "necessary" to make the Planning Act work.

Furthermore, there is nothing in either the record or the Act itself to suggest that the type of private activity engaged in by BCA and Blue Cross was ever viewed as at all "necessary" to the achievement of the goals of the Act. The Planning Act as passed nowhere mentions—much less requires—tying third-party reimbursement to need determinations. Nor is there any evidence in the record to indicate that MAHSA ever viewed the "need" determination policy of Blue Cross as being "necessary" to achieving the goals of the Act.[34] Certainly the record is clear that MAHSA

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[33] H.R. 16204, 93d Cong., 2d Sess. (1974). Specifically, under the House version, states electing to participate in the SSA section 1122 Program as an alternative to establishing a mandatory certificate of need program would have been required to extend section 1122 need review to private third party payors such as respondent Blue Cross. *See* H.R. Rep. No. 1382, 93d Cong., 2d Sess. 42, 73 (1974).

never requested Blue Cross to undertake its action, and the MAHSA Health Systems Plan, from which the court below quoted extensively and upon which it so heavily relied (628 F.2d at 1055, J.A. at 207a-209a), contains no mention of the Blue Cross "need" determination policy.[35] Similarly, there is no indication in the record that DHHS ever viewed the Blue Cross policy as being "necessary" to achieve the goals of the Act. As one commentator so aptly put it:

> [T]here is no suggestion that cooperation between HSAs and private insurers is necessary for the Planning Act to function. . . . Invoking platitudes about the need for voluntary cooperation with the planning agency does not substitute for a searching investigation into whether antitrust immunity is necessary to make the regulatory scheme work. [F. Miller, "Antitrust and Certificate of Need: Health Systems Agencies, the Planning Act, and Regulatory Capture," 68 *Georgetown L.J.* 873, 891 (1980).]

In contrast to the schemes of regulation in the banking, securities, airline, electric power and communications industries, the Planning Act hardly creates the kind of "perva-

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[34] Even if there were such evidence, it would hardly be conclusive, since only Congress may repeal a federal statute. *See, e.g., Tennessee Valley Authority* v. *Hill*, 437 U.S. 153, 194 ("[it is] . . . the exclusive province of the Congress not only to formulate legislative policies and mandate programs and projects, but also to establish their relative priority for the Nation."). MAHSA, a private corporation, clearly has no power to do so. Consequently, the apparent reliance of the court below on the MAHSA 1978-1982 Health Systems Plan to support its conclusion of implied repeal is totally misplaced.

[35] As summarized by the court below, the only provisions of the MAHSA Plan dealing specifically with third-party payors relate to the development of uniform reporting systems and procedures—a subject which clearly is not relevant here. (628 F.2d at 1055, J.A. at 208a-209a.)

sive regulatory scheme" this Court has repeatedly identified as an important element in finding implied repeal. *See United States* v. *National Association of Securities Dealers, Inc.*, 422 U.S. 694, 735; *Otter Tail Power Co.* v. *United States*, 410 U.S. 366, 374; *Hughes Tool Co.* v. *Trans World Airlines, Inc.*, 409 U.S. 363, 387; *United States* v. *Philadelphia National Bank*, 374 U.S. 321, 352; *United States* v. *Radio Corp. of America*, 358 U.S. 334, 350-51; *Silver* v. *New York Stock Exchange*, 373 U.S. 341, 347, 360-61; *California* v. *Federal Power Commission*, 369 U.S. 482, 485. *See also* F. Miller, "Antitrust and Certificate of Need: Health Systems Agencies, the Planning Act, and Regulatory Capture," 68 *Georgetown L.J.* 873, 891 (1980) ("in the health industry, regulation is fragmented rather than pervasive"); and 1 Areeda & Turner, *Antitrust Law* ¶ 224, at 145 (1978) ("[i]mmuity is not likely where the agency has relatively little to do with the protection of competition or where its responsibilities for the regulated industry are not 'pervasive'.").[36]

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[36] It may be noted that various proposals were rejected by Congress which would have made the Planning Act scheme significantly more comprehensive than it in fact now is. For example, one of the proposals would have allowed HSAs, in conjunction with State Agencies to eliminate existing "unneeded" health care facilities. Another would have allowed the Secretary of DHEW (now DHHS) to enter into agreements with all State Agencies to regulate and establish rates for health services. *See* H. Conf. Rep. No. 1640, 93d Cong., 2d Sess. 73, 77, *reprinted in* [1974] U.S. Code Cong. & Ad. News 7842, 7983, 7987. These rejected provisions, combined with the Act as passed, demonstrate that Congress exercised some care *not* to create a pervasive regulatory scheme.

Furthermore, even in industries where regulation is far more comprehensive than in health care, implied immunity is not necessarily found. *See, e.g., United States* v. *Radio Corp. of America*, 358 U.S. 334; *Sound, Inc.* v. *American Telephone and Telegraph Co.*, 631 F.2d 1324 (8th Cir. 1980); *Essential Communications Systems, Inc.* v. *American Telephone and Telegraph Co.*, 610 F.2d

For example, in *United States* v. *National Association of Securities Dealers, Inc.*, 422 U.S. 694, this Court found that Congress intended that mutual funds have the power to impose vertical restraints on disposition of their securities —the conduct challenged—subject to the review of the Securities and Exchange Commission. This Court reasoned that "maintenance of an antitrust action for activities *so directly related to the SEC's responsibilities* poses a substantial danger that appellees would be subjected to duplicative and inconsistent standards," and therefore concluded that "the Sherman Act has been displaced by the *pervasive regulatory scheme* established by the Maloney and Investment Company Acts." 422 U.S. at 735 (emphasis added).

In *Pan American World Airways, Inc.* v. *United States*, 371 U.S. 296, this Court found that a market division agreement entered into by Pan American was exempt from antitrust scrutiny under section 411 of the Federal Aviation Act of 1958, which gave the Civil Aeronautics Board jurisdiction over "unfair practices and methods of competition" in the airline industry. This Court noted that the CAB has been given "broad jurisdiction over air carriers" (*id.* at 304), and that the "[l]imitation of routes and divisions of territories and the relation of common carriers to air carriers are basic in this regulatory scheme" (*id.* at 305). Consequently, this Court concluded that "[i]f the courts were to intrude independently with their construction of the antitrust laws, two regimes might collide." *Id.* at 310.

Finally, in *Hughes Tool Co.* v. *Trans World Airlines, Inc.*, 409 U.S. 363, this Court held that certain allegedly anticompetitive acts by Toolco, TWA's parent, which were designed

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1114 (3d Cir. 1979); *Litton Systems, Inc.* v. *American Telephone and Telegraph Co.*, 487 F. Supp. 942 (S.D.N.Y. 1980); *Oahu Gas Service, Inc.* v. *Pacific Resources, Inc.*, 460 F. Supp. 1359 (D. Haw. 1978).

to control the acquisition of and financing of aircraft by TWA, were exempt from the antitrust laws under section 408 of the Federal Aviation Act, which subjects a broad range of transactions to the review of the CAB, and section 414, which immunizes from the antitrust laws those transactions approved by the Board. This Court, noting that "the parent company which controls an air carrier is subject to pervasive control by the CAB" (*id.* at 387), concluded that the challenged acts were under the CAB's control and surveillance, and were therefore immune under the antitrust laws.

Obviously, this case bears little similarity to those cases. There, immunity was implied because the application of the antitrust laws would have conflicted with the efforts of regulatory agencies charged with pervasive regulatory authority. In contrast, the Planning Act creates *no* federal regulatory agency with *any* regulatory authority over Blue Cross or BCA, much less a "pervasive regulatory scheme." Most importantly, no public agency has any authority under the Act to approve or authorize any business conduct by Blue Cross or BCA, much less a clearly anticompetitive group boycott otherwise in violation of the antitrust laws. As in *Silver*, a conclusion that the antitrust laws had been impliedly repealed would "defeat the Congressional policy reflected in the antitrust laws" (373 U.S. at 360) without serving any federal regulatory policy.

CONCLUSION

The judgment of the court below should be reversed.

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